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7

8 UNITED STATES DISTRICT COURT
9 FOR THE CENTRAL DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,

11 Plaintiff,

12 v.

13 JOHN McTIERNAN,

14 Defendant.
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Case No.: 2:06-CR-00259-DSF

**DEFENDANT JOHN
McTIERNAN'S NOTICE OF
MOTION AND MOTION TO
SUPPRESS PURSUANT TO 18
U.S.C. § 2515, OR, IN THE
ALTERNATIVE, REQUEST FOR
EVIDENTIARY HEARING;
MEMORANDUM OF POINTS
AND AUTHORITIES;
DECLARATION OF S. TODD
NEAL; NOTICE OF
LODGMET.**

Hearing Date: June 1, 2010

Time: 8:30 a.m.

Courtroom: 840

The Honorable Dale S. Fischer

Trial Date: July 13, 2010

23 PLEASE TAKE NOTICE THAT on June 1, 2010, at 8:30 a.m., or as soon
24 thereafter as counsel may be heard in Courtroom 840 of the above-entitled Court
25 located at 255 East Temple Street, Los Angeles, California, defendant John
26 McTiernan will move this Court for an order suppressing the audio recording of
27 communications between Anthony Pellicano and Mr. McTiernan occurring on
28 August 17, 2000 and the fruits of those communications. Alternatively,

1 Mr. McTiernan moves this Court for an evidentiary hearing on his motion to
2 suppress.

3 This motion is based on the accompanying Memorandum of Points and
4 Authorities, the attached declaration of S. Todd Neal, the accompanying Notice of
5 Lodgment, the court records and pleadings in the court files for this case, and on
6 any evidence and argument that may be presented to the Court at the hearing.

7
8 Respectfully submitted,

9 DATED: April 26, 2010

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

11
12 By: /s/ S. Todd Neal
13 S. Todd Neal
14 Attorney for Defendant JOHN
15 McTIERNAN
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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Counts 1 and 2 of the First Superseding Indictment allege that Defendant John McTiernan (“Mr. McTiernan”) made false statements to a federal agent on February 13, 2006. On that date Mr. McTiernan received a telephone call from FBI Special Agent Stanley Ornellas. The Government alleges that Mr. McTiernan was asked if he had knowledge of wiretapping by Anthony Pellicano (“Mr. Pellicano”) and whether he had previously discussed wiretapping with Mr. Pellicano. The Government alleges that Mr. McTiernan denied such knowledge or prior discussions and that his responses were false, in violation of 18 U.S.C. § 1001, False Statements. *See* Counts 1 and 2, First Superseding Indictment.¹

The telephone call was Mr. McTiernan’s first contact with Special Agent Ornellas, who said that he was calling regarding Mr. Pellicano. The exclusive “evidence” which caused Special Agent Ornellas to contact Mr. McTiernan is a *single* audio recording which purportedly reflects a telephone communication between Mr. Pellicano and Mr. McTiernan occurring on August 17, 2000 (hereinafter referred to as the “Recording”). The Recording was surreptitiously recorded by Mr. Pellicano *without the knowledge or consent* of Mr. McTiernan. Ironically, the Recording reveals that Mr. Pellicano demanded assurances from Mr. McTiernan that no other person was listening on Mr. McTiernan’s side of the call. Despite his insinuation that they were having a confidential communication, Mr. Pellicano secretly recorded the conversation and stored the audio tape on a computer in his office. Accordingly, the Recording is a two party communication that was recorded with the consent of only one party.

Indisputably, the charges against Mr. McTiernan arise from the illegally made Recording. The Recording was seized by the Government from

¹ In a separate motion Mr. McTiernan moves for consolidation of Counts 1 and 2 based on multiplicity. That motion is made on the grounds that Counts 1 and 2 refer to a single offense charged in multiple counts, in violation of, *inter alia*, the double jeopardy clause of the Fifth Amendment to the U.S. Constitution.

1 Mr. Pellicano's computer pursuant to a search warrant executed on Pellicano
 2 Investigative Agency, Ltd. ("PIA"). *See* Ex. 1 to Declaration of S. Todd Neal. *But*
 3 *for* the Government's discovery of the illegal Recording, the interview of
 4 Mr. McTiernan would not have occurred.

5 A single-party consent recording is inadmissible in a federal criminal trial if
 6 one of the purposes for the recording is criminal or tortious. 18 U.S.C. §§
 7 2511(2)(d) and 2515 ("Title III"). *United States v. Lam*, 271 F. Supp. 2d 1182
 8 (N.D. Cal. 2003). Even if there is a legitimate purpose for the recording, an
 9 additional criminal or tortious purpose requires suppression. *Sussman v. American*
 10 *Broadcasting Cos.*, 186 F.3d 1200 (9th Cir. 1999), cert. denied, 528 U.S. 1131
 11 (2000). To prevail on this motion, Mr. McTiernan only has to prove by a
 12 preponderance of the evidence that Mr. Pellicano made the Recording for at least
 13 one criminal or tortious purpose. If this burden is met, the Government is
 14 precluded from using the Recording at trial. *See United States v. Phillips*, 540 F.2d
 15 319, 327 (8th Cir. 1976).

16 Here, the evidence presented during Mr. Pellicano's two trials before this
 17 Court in 2008 conclusively shows that Mr. Pellicano had numerous criminal or
 18 tortious purposes for recording his own clients, including Mr. McTiernan.²
 19 Mr. Pellicano's conviction on seventy-eight (78) separate criminal counts including
 20 but not limited to RICO, RICO conspiracy, interception of wire communications,
 21 and manufacturing and possessing a wiretapping device, involved significant
 22 testimony from former employees of PIA and former clients of PIA. These
 23 witnesses provided first hand knowledge regarding Mr. Pellicano's method of
 24 secretly recording his telephone communications with clients and his *purpose* for
 25 making the recordings. This testimony was provided by witnesses such as Tarita
 26 Virtue, Lilly LeMasters, and Susan Maguire, among others. In summary, their

27 ² The "first" Pellicano trial (approximate dates 3/3/08-4/30/08) is hereinafter referred to as
 28 "Pellicano Trial I" and the "second" Pellicano trial (approximate dates 7/16/08-8/29/08) is
 referred to as "Pellicano Trial II." During Pellicano Trial I the Government played twenty-six
 (26) excerpts of recorded conversations between Mr. Pellicano and his clients.

1 testimony established that Mr. Pellicano (a) only recorded specific calls, he did not
2 record all calls; (b) he not only took deliberate actions to record communications
3 with his clients, including Mr. McTiernan, he also took affirmative steps to
4 preserve and encrypt those communications; and (c) he *made* and *used* the
5 recordings as a *record-keeping mechanism*.³

6 The purposely made client recordings provided Mr. Pellicano with a vital
7 record of the material terms of his illegal activities on behalf of clients: details of
8 payment, specifics of assignments, confirmation of information furnished to clients,
9 a checklist of work to be done, etc. Furthermore, the evidence confirms that the
10 recordings guided his illegal activity on behalf of clients and the recordings were
11 made for that specific purpose. Such a purpose was fundamentally criminal, by
12 definition, in that the recordings facilitated, furthered, and advanced
13 Mr. Pellicano's criminal activities and were, therefore, *criminal in purpose*.

14 The Ninth Circuit has repeatedly held, in numerous contexts, that record
15 keeping is a function that furthers a criminal enterprise or conspiracy. *See, e.g.,*
16 *United States v. Smith*, 893 F.2d 1573, 1575-78 (9th Cir. 1989)(personal calendar
17 used as a ledger to record drug transactions was maintained for the purpose of
18 furthering the criminal enterprise); *United States v. Moran*, 482 F.3d 1101, 1108
19 (9th Cir. 2006)(maintaining of computer records in a tax conspiracy found to be in
20 furtherance of conspiracy). Even mailings or wire communications that are not
21 independently false or deceptive can be deemed to have been made for a criminal
22 purpose. *See* Ninth Circuit Model Jury Instructions (Criminal) 8.101, 8.102, 8.103;
23 *See also Schmuck v. United States*, 489 U.S. 705, 715 (1989)(even ostensibly
24 benign mailings can be deemed to have been made for a criminal purpose).

25 But Mr. Pellicano's purpose for recording his communications with clients

26
27 ³ In addition to the trial testimony, there are also several FBI 302 Reports reflecting witness
28 interviews of other former PIA employees who confirm Mr. Pellicano's criminal purpose for
recording his own clients. These former PIA employees include Wayne Reynolds, Stacy Joiner,
Linda Bottlik, Tracy Martin and Andrea Metz. Their FBI 302 Reports are being attached as
exhibits and will be discussed within the Argument section of this Memorandum.

1 goes beyond simply facilitating or aiding his criminal activities as the client
2 recordings were not merely oral checklists or verbal receipts. Instead, if the client
3 recordings are considered in relation to the entirety of the evidence, *this really was*
4 the “record keeping of a criminal enterprise” because the client recordings may
5 have been, in effect, the *only* “records” of Mr. Pellicano’s RICO conspiracy. The
6 trial evidence established that PIA had two distinct sides: while some legitimate
7 investigation services were provided, there was also a significant illicit operation --
8 the racketeering component -- that performed illegal investigation services on a
9 continuing basis. In fact, the Government argued that the “criminal enterprise”
10 operated under a veneer of legitimacy provided by PIA’s legitimate side and thus
11 PIA served as a “cover” for the illicit operation. The illicit services provided by the
12 covert side of PIA included (alleged) wiretapping, unauthorized computer access,
13 extortion, witness intimidation, etc.

14 Clearly, the trial evidence proved that the volume of illicit services was
15 substantial and the racketeering operation was generating sizable revenues from a
16 large number of clients (each of whom had unique issues and requirements). Yet a
17 review of the evidence -- including more than 32,000 pages of discovery produced
18 by the Government and the transcripts from both trials -- reveals an astonishing
19 fact. Even though the racketeering operation was a substantial portion of the
20 “work” being done at PIA, the client recordings were, in effect, the *only* records of
21 the illicit criminal enterprise to be offered in evidence during Mr. Pellicano’s two
22 trials. To prove the RICO enterprise the Government relied almost exclusively on
23 the secret client recordings (as opposed to e-mails, notes, invoices, contracts,
24 records of work performed for clients, billing information, etc.). Considering the
25 multiple searches of PIA’s offices, including PIA’s computers and electronic
26 media, it is significant to the sole issue of this motion that the client recordings
27 were the *only* records of the illicit criminal enterprise.

28 This compelling fact illuminate Mr. Pellicano’s *purpose* in making the client

recordings: the recordings were made as *his* record of his criminal enterprise. Furthermore, the evidence shows that he used the recordings to operate the illicit enterprise, manage the illicit work and manage the associated clients. Mr. Pellicano was the organizer and leader of the enterprise (according to the Government), and managing all of the different clients with their different requirements, unique facts and differing payment arrangements created an organizational challenge. Yet we have no evidence of invoices, contracts, billing history, written client communications, or written records regarding work performed. Instead, the client recordings are the only “records” of the criminal enterprise. It cannot reasonably be stated that Mr. Pellicano operated so large an illicit business from his head, relying only on memory, with no client memoranda, notes, billing history or records of work performed. That makes no sense and is not plausible. Much more likely is that Mr. Pellicano recorded his clients, including Mr. McTiernan, as *his* record of his criminal enterprise and he used the recordings to guide his work and operate the enterprise. Accordingly, because the evidence shows that it is more likely than not that Mr. Pellicano made the Recording for a criminal or tortious purpose, pursuant to the plain language of Title III Mr. McTiernan respectfully seeks a suppression order precluding the Government from using the Recording at trial.

II. STATEMENT OF FACTS IN SUPPORT OF MOTION

A. Mr. Pellicano Admits that He Used the Client Recordings to Guide His Work and Manage His Client Relationships

Of course, the best evidence of Mr. Pellicano’s purpose for recording his clients comes directly from Mr. Pellicano. During opening statements in Pellicano Trial I, while acting as his own counsel Mr. Pellicano explained why he recorded his clients:

Mr. Pellicano, during the course of his endeavors and work, would have a minimum of 50 phone calls a day. And during that — during those phone calls there would be calls from people that he was investigating, from clients and other individuals that he needed to keep

1 constant contact with. Now, *he decided to record those*
 2 *conversations for — you know, for inventory; for*
 3 *safekeeping; for, in effect, to remind himself of what he*
 4 *needed to do and what a client professed a need to have,*
 5 and thought, well, the best way to do that is to have a
 program to do that, to record those conversations in an
 encrypted fashion so that no one else but Mr. Pellicano
 could listen to those recordings ever.

(Ex. 2 to Neal declaration, 3/6/08 Transcript, p. 33 lines 8-21 emphasis added).

6 Mr. Pellicano's statement as to his purpose for recording calls, including
 7 calls with clients, verifies that the recordings were used to guide and facilitate the
 8 activities of the RICO enterprise. His selection of words describing his purpose is
 9 informative: "for inventory ... for safekeeping ... to remind himself of what he
 10 needed to do and what a client professed a need to have." These words are not
 11 indicative of taping that was done as a meaningless habit that had no purpose.
 12 Instead, the client recordings were purposely made to provide Mr. Pellicano with a
 13 mechanism to manage and lead the enterprise. By his own account, the client
 14 recordings provided him with an inventory or reminder of future work. Therefore,
 15 the client recordings were purposely created as a record keeping exercise in
 16 furtherance of the criminal enterprise. This is a criminal purpose.

17 For purposes of this motion, Mr. Pellicano's explanation of why he recorded
 18 his clients is admissible and should be considered by the Court. In fairness, it
 19 would be legal folly to ignore Mr. Pellicano's own admission regarding *his purpose*
 20 for recording his own clients, especially when that is the pivotal issue presented by
 21 this motion. While Mr. Pellicano's opening statement could not have been
 22 considered by the jury as evidence in his trial, that limitation derives from a model
 23 jury instruction, not the Federal Rules of Evidence. Additionally, the limitation is
 24 specific to a jury trial setting. There is nothing in the law that prohibits the Court
 25 from considering Mr. Pellicano's statement in determining whether it is more likely
 26 than not that Mr. Pellicano recorded Mr. McTiernan for a criminal or tortious
 27 purpose.
 28

Mr. Pellicano's statement as to his purpose for recording calls with clients is

1 non-hearsay and properly admitted as an admission and/or authorized admission
 2 (based on Mr. Pellicano serving as his own counsel). However, even if deemed
 3 hearsay, the statement is admissible as a statement against interest under Fed. R.
 4 Evid. 804(b)(3). Additionally, the statement satisfies the residual hearsay exception
 5 recognized by Fed. R. Evid. 807, to wit:

6 (A) the statement is offered as evidence of a material fact; (B) the statement
 7 is more probative on the point for which it is offered than any other evidence which
 8 the proponent can procure through reasonable efforts; and (C) the general purposes
 9 of these rules and the interests of justice will best be served by admission of the
 10 statement into evidence. Fed. R. Evid. 807.

11 Here, Mr. McTiernan's counsel repeatedly sought a declaration from
 12 Mr. Pellicano to support this motion but he has received no response. (Neal
 13 declaration at ¶ 41). Presumably, after refusing to testify during two criminal trials,
 14 Mr. Pellicano continues to assert his 5th Amendment privilege while his appeals are
 15 pending. Under these facts, Mr. Pellicano's statement presents a textbook instance
 16 warranting application of Federal Rule of Evidence 807. The statement is offered
 17 as evidence of a material fact; it is more probative on the point than any other
 18 evidence Mr. McTiernan can reasonably procure; and admission of the statement is
 19 consistent with principles such as furthering the administration of justice by
 20 considering all reasonably reliable evidence in adjudicating cases.

21 **B. The Government's Reliance on the Client Recordings at Trial is**
 22 **Further Evidence of the Important Role the Recordings Played in**
 23 **Mr. Pellicano's Criminal Enterprise**

24 During Pellicano Trial I, in its case-in-chief the Government played twenty-
 25 six recordings made by Mr. Pellicano representing telephone calls he had with
 26 various clients, including the Recording that Mr. Pellicano secretly made of his call
 27 with Mr. McTiernan.⁴ The Government's reliance on the client recordings makes it

28 ⁴ The clients included Charles Lull, Adam Sender, George Kalta, Jennifer Megarry, Andrew Stevens, Chris Rock, Mark Cohn, Kenneth Starr, Leo Portcarrero, Suzan Hughes, Taylor Thomson, Michael Ovitz.

1 difficult to fathom that there can now be any legitimate argument that the
2 recordings were not an essential part of Mr. Pellicano's RICO enterprise. The
3 Government also relied heavily on Mr. Pellicano's secret client recordings during
4 Pellicano Trial II. During many days of trial the jury listened to lengthy
5 recordings, often consuming more time than the presentation of live testimony. In
6 total, four hundred and ninety-one (491) pages of the transcript of Pellicano Trial II
7 were devoted to the Government playing recordings that Mr. Pellicano secretly
8 made of his communications with Mr. Christensen. (Neal declaration at ¶ 42).

9 The Government used Mr. Pellicano's secretly made client recordings as the
10 framework for its presentation of evidence and as its bedrock of proof. The
11 Government quoted from the recordings in opening statement, repeatedly played
12 the recordings in its presentation of evidence and then played certain recordings
13 again during closing argument. The Government repeatedly urged the juries in
14 both trials to recognize that the details of the illicit activity were acknowledged and
15 agreed to in the recordings (e.g. "don't take my word for it, listen to their words").
16 That was the blueprint for trial to prosecute Mr. Pellicano and his co-conspirators
17 and it succeeded. It succeeded because the recordings *do* confirm the details of the
18 illicit activity.

19 Because the recordings evidence a consistent and formulaic approach by
20 Mr. Pellicano, it should be inferred that he had a specific purpose in making the
21 secret recordings (and it was a criminal purpose). His purpose was to create a
22 record (a) establishing the amount the client agreed to pay (after being strong-
23 armed); (b) confirming the client's vow of secrecy; (c) obtaining the details of the
24 illegal assignment; and (d) creating leverage over the client with an incessant 'con
25 artist' routine that relied on crude psychological manipulation. In his own words,
26 Mr. Pellicano recorded these interchangeable client communications to create an
27 "inventory" or record to "remind himself of what he needed to do." That was a
28 criminal purpose because the recordings were intended to further his criminal

enterprise.

C. Mr. Pellicano's Client Recordings Were Not Indiscriminately Made but Instead Were Purposely Made to Support the Criminal Enterprise

Substantial evidence indicates that Mr. Pellicano's client recordings were not made by meaningless routine or happenstance. The opposite is true as he took a series of calculated steps designed to secretly create the recordings, followed by another series of premeditated steps to preserve, encrypt and conceal the recordings. A sampling of this evidence includes the following:

1. Mr. Pellicano did not indiscriminately record calls with clients.

If a recording was made, it was made purposely.

Source	Evidence
Trial Testimony of former PIA Employee Tarita Virtue, Ex. 3 to Neal declaration.	Mr. Pellicano "didn't have a practice of recording everything, he only recorded specific [calls]." He would activate the recording with a switch by his telephone.
Trial Testimony of former PIA Employee Lily LeMasters, Ex. 4 to Neal declaration.	Mr. Pellicano "flipped the switch" next to his telephone or Ms. LeMasters flipped the switch for him when he wanted to record a call with a client.
Trial Testimony of former PIA Employee Lily LeMasters, Ex. 5 to Neal declaration.	Mr. Pellicano "sometimes" recorded calls with clients, he did not record all calls.
FD-302a Report re former PIA Employee Andrea Metz, Ex. 6 to Neal declaration.	Ms. Metz personally observed Mr. Pellicano recording his own telephone calls.
FD-302a Report re former PIA Employee Wayne Reynolds, Ex. 7 to Neal declaration.	Mr. Reynolds knew from personal observation that Mr. Pellicano made a practice of recording his own telephone conversations.

2. Mr. Pellicano secretly made the recordings without his clients' knowledge or consent:

Source	Evidence
FD-302a Report re Lily LeMasters, Ex. 8 to Neal declaration.	Ms. LeMasters was not aware of Mr. Pellicano ever advising clients that

1		he was recording their communications.
2	Trial Testimony of Matt Williams, Ex. 9 to Neal declaration.	Q. [By Mr. Saunders] Mr. Williams, did you know at the time you were having that conversation that it was being recorded?
3		A. No.
4		
5	Trial Testimony of Adam Sender, Ex. 10 to Neal declaration.	Q. [By Mr. Saunders] Mr. Sender, by the way did you know that Defendant Pellicano was recording you?
6		A. I did not.
7		

3. The recordings were made for the purpose of record keeping in furtherance of the criminal enterprise. Mr. Pellicano often had his staff prepare transcripts of his secret recordings:

11	Source	Evidence
12	Trial Testimony of Tarita Virtue (3/12/08), Ex. 11 to Neal declaration;	On occasion, Mr. Pellicano instructed Ms. Virtue to prepare a transcript of his recorded call with a client.
13	Trial Testimony of Tarita Virtue (7/23/08), Ex. 12 to Neal declaration.	
14	FD-302a Report re former PIA Employee Linda Bottlik, Ex. 13 to Neal declaration.	Mr. Pellicano instructed Ms. Bottlik to prepare transcripts of his recorded calls with clients.
15	FD-302a Report re former PIA Employee Tracy Martin, Ex. 14 to Neal declaration.	Ms. Martin's primary duties were in Mr. Pellicano's audio laboratory transcribing taped conversations. Mr. Pellicano made a practice of recording his own telephone conversations.
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4. Mr. Pellicano transferred the recordings of his calls with clients to an external hard drive for safekeeping:

23	Source	Evidence
24	Trial Testimony of Tarita Virtue (7/23/08), Ex. 15 to Neal declaration.	Mr. Pellicano transferred his recorded conversations to an external hard drive.
25		

Objectively, Mr. Pellicano's course of conduct with respect to his client recordings confirms that the recordings were critical, at least in his mind, to the operation of the criminal enterprise. Additionally, the evidence confirms that Mr. Pellicano was unwilling to create written records relating to his illicit activity

1 and, therefore, he *made* and *used* the recordings as a *record-keeping mechanism*.
2 This is proven by Mr. Pellicano's recorded communications with clients. For
3 example, in a conversation with Charles Lull wherein Mr. Pellicano demanded an
4 additional \$100,000.00 that Mr. Lull contended had not been agreed to,
5 Mr. Pellicano stated: "No, listen to me ... you have to understand something. I
6 don't put together contracts *for things like this*." (Trial Transcript (3/20/08), Ex. 16
7 to Neal declaration). Another example of the record keeping function served by the
8 recordings comes from a recorded communication with client Jennifer Megarry.
9 Mr. Pellicano explained why he did not send written invoices or statements for his
10 illicit operations: "If you just retain me with no paperwork, they don't know what
11 you hired me for. You could be hiring me for guard service ... You know if I send
12 you a statement, I have to say on the statement what it's for." (Trial Transcript
13 (4/04/08), Ex. 17 to Neal declaration).

14 Mr. Pellicano's illicit operation did not rely on written records. In place of
15 written records, the evidence establishes that it is more likely than not that
16 Mr. Pellicano recorded his clients to guide his work and operate the enterprise.
17 Accordingly, Mr. Pellicano had a criminal intention and criminal purpose in
18 making the client recordings.

19 Because the sole issue presented by this motion is Mr. Pellicano's purpose
20 for recording communications with his clients (including Mr. McTiernan), it is
21 important to consider circumstantial evidence such as his mode of operation. The
22 enterprise, no doubt, was predicated on Mr. Pellicano selling illegal services to
23 wealthy clients (that *was* the criminal enterprise). To further the success of the
24 illicit operation, Mr. Pellicano used continual manipulation during his
25 communications with clients in order to extract as much money from them as
26 possible. This included recurring use of identical methods of manipulation (e.g.
27 "There's only two people in the world that know about this ... I'm not supposed to
28 be telling you this stuff ... You cannot say a word to anybody in the world about

1 what I just told you ... I have been paying for this out of my own pocket ... Send
2 me another \$25,000 ...”).

3 Since there is no market or customary price for the “service” sold by
4 Mr. Pellicano, the fee he would receive was completely dependent on the mind set
5 of the client. To him, a client was a mark, a target to be exploited. Mr. Pellicano
6 spent a substantial amount of his time talking with and manipulating his marks.
7 The client recordings allowed him to track where he left off in his manipulation of
8 the client, i.e., what was the last lie, the last promise? What was the client’s mental
9 state when they last spoke? The only logical inference is that the recordings
10 assisted him in tracking these necessary details, thereby furthering the criminal
11 enterprise. Therefore, the client recordings were made for a criminal purpose.

12 **D. It is Clear that the Client Recordings Were Purposely Made by**
13 **Mr. Pellicano to Support the Illicit Criminal Enterprise Because**
14 **the Recordings May Have Been the Only Records of the**
Enterprise

15 Despite at least four separate search warrants that were executed at PIA
16 (including all of the computer and electronic media seized), the Government found
17 very little evidence (if any) beyond Mr. Pellicano’s secret client recordings.
18 Unequivocally, the results of the searches did not fulfill the expectations outlined
19 by the Government in the corresponding search warrant affidavits. To establish
20 probable cause Special Agent Ornellas provided three separate affidavits
21 describing, *inter alia*, the basis for the requested warrants *and the items expected to*
22 *be seized.*⁵ In detailing the evidence the Government anticipated finding relating to
23 suspected illegal wiretapping, wire fraud, unauthorized use of computer equipment
24 and conspiracy, Special Agent Ornellas described how, based on his substantial
25 training and experience (including twenty-six years with the FBI and three years as
26 a private investigator), he expected to find the following evidence:

27 retainer agreements; contracts; invoices; billing/payment
28 records; correspondence; letters; notes; e-mails; client
 files containing retainer information indicating the

⁵ FBI Special Agent R.T. Ballard, III, provided the affidavit supporting the fourth warrant.

1 identity of the client and the purpose for which the
2 investigator was retained; records of work performed for
clients, etc.

3 (Exs. 18-20 to Neal declaration, Search Warrant Affidavits of Special
4 Agent Ornellas).

5 Thereafter, the Government fully executed on the four search warrants and
6 Special Agent Ornellas confirmed in his trial testimony that the Government seized
7 “a great deal of documentation and computer equipment,” including the seizure and
8 search of “many computers.” Special Agent Ornellas testified that the Government
9 acquired a “virtual copy” of Mr. Pellicano’s business operations. (Trial Transcript
10 (4/18/08), Ex. 21 to Neal declaration). However, despite this accumulation of
11 seized items, the Government found virtually none of the anticipated items to
12 support its racketeering case. Exhibits 22-28 to the Neal declaration set forth the
13 Government’s property receipts and FD-302 reports pertaining to the searches of
14 PIA’s offices.⁶ These exhibits confirm that the Government did not find the
15 anticipated evidence relating to the illicit services provided by the covert side of
16 PIA. Instead, the Government found the client recordings – the true and actual
17 records of the criminal enterprise.

18 It is self-evident that in an illegal business the creation of written records is
19 often avoided. Mr. Pellicano confirmed that, to the extent possible, he avoided the
20 creation of written records relating to his illicit activities (*See* Exs. 16-17). Instead,
21 he created secret encrypted recordings that he transferred to a hard drive and stored.
22 These recordings, which included the Recording involving Mr. McTiernan, were
23 accessible only to Mr. Pellicano and hidden from all others. Furthermore, the client
24 recordings demonstrate that Mr. Pellicano time and time again used the recorded
25 client communications to confirm details that were of material importance to his
26

27 ⁶ Ex. 22 is FD-340, Property Receipts from Search dated 11/21/02; Ex. 23 is FD-340,
28 Photographic Log of PIA Search dated 11/21/02; Ex. 24 is FD-302 of 11/21/02; Ex. 25 is FD-302
of 12/4/02; Ex. 26 is FD-340, Search Warrant Property Receipts dated 1/15/03; Ex. 27 is FD-302
of 3/23/03; Ex. 28 is FD-302 of 8/8/05.

1 criminal enterprise, such as:

- 2 1. Agreements regarding his fees;
- 3 2. Status reports on the progress of the illegal activity conducted on
- 4 behalf of clients;
- 5 3. Discussions regarding work to be done;
- 6 4. Obtaining vows of secrecy from the clients
- 7 5. Developing leverage over clients by continuously making claims of
- 8 influential contacts, favors he was owed, access to powerful people, etc., all of
- 9 which was designed to allow Mr. Pellicano to exert psychological control over the
- 10 client so that he could extract unconscionable and unlawful fees.

11 Mr. Pellicano systematically covered each of these specific areas, and
 12 recorded himself doing so, for the express purpose of bolstering and continuing the
 13 criminal enterprise. Accordingly, the weight of the evidence proves that
 14 Mr. Pellicano had a criminal purpose for recording his clients, including
 15 Mr. McTiernan.

16 **III. ARGUMENT**

17 **A. The Plain Language of Title III Requires Suppression of the** 18 **Recording**

19 “Whenever any wire or oral communication has been intercepted, no part of
 20 the contents of such communication and no evidence derived therefrom may be
 21 received in evidence in any trial ... if the disclosure of that information would be in
 22 violation of this chapter.” 18 U.S.C. § 2515. Therefore, intercepted wire
 23 communications *must* be suppressed if they were obtained in violation of Title III.

24 Under Title III, all interceptions of communications are unlawful unless
 25 specifically authorized by its provisions. 18 U.S.C. § 2511(1)(a). The only
 26 provision that authorizes interception by private parties is section 2511(2)(d):

27 It shall not be unlawful under this chapter ... for a person
 28 not acting under color of law to intercept a wire, oral, or
 electronic communication where such person is a party to
 the communication... unless such communication is
 intercepted *for the purpose of committing any criminal or*

1 *tortious act in violation of the Constitution or laws of the*
 2 *United States or of any State.*

3 18 U.S.C. § 2511(2)(d) (emphasis added). Accordingly, Title III makes clear that a
 4 party to a communication who is not acting under “color of law” is not authorized
 5 to intercept the communication if the interception is “for the purpose of committing
 6 any criminal or tortious act ...” *Id.* If a private party intercepts a communication
 7 for the purpose of committing a criminal or tortious act, the interception is unlawful
 8 and must be suppressed (along with its fruits). *See Chandler v. United States Army*,
 9 125 F.3d 1296, 1298 (9th Cir. 1997); *United States v. Lam*, 271 F. Supp. 2d at
 10 1183.

11 In order to be entitled to suppression, Mr. McTiernan must only show by a
 12 preponderance of the evidence that the Recording was made for the purpose of
 13 committing a criminal or tortious act. *United States v. Phillips*, 540 F.2d at 327;
 14 *United States v. Zarnes*, 33 F.3d 1454, 1469 (7th Cir. 1994); *United States v. Dale*,
 15 991 F.2d 819, 841 (D.C. Cir. 1993); *Trafficant v. Comm’r*, 884 F.2d 258, 266 (6th
 16 Cir. 1989). The focus is on whether the purpose for the interception, i.e., its
 17 intended use, was criminal or tortious. *Sussman v. American Broadcasting Cos.*,
 18 186 F.3d 1200, 1202 (9th Cir. 1999) cert. denied, 528 U.S. 1131 (2000). However,
 19 it need not be shown that the sole purpose was criminal or tortious. It is sufficient
 20 for a defendant to show that either the primary motivation was criminal or tortious,
 21 or that a determinative factor in the actor’s motivation was to commit a criminal or
 22 tortious act. *United States v. Dale*, 991 F.2d at 841-42, quoting *United States v.*
 23 *Vest*, 639 F.Supp. 899, 904 (D.Mass. 1986). The Ninth Circuit has made clear that
 24 an interception can be made for a legitimate purpose and still be criminal or
 25 tortious so long as the primary motivation was criminal or tortious. *Sussman v.*
 26 *American Broadcasting Cos.*, 186 F.3d at 1202.

27 In enacting Title III, Congress established a “comprehensive scheme for the
 28 regulation of wiretapping and electronic surveillance.” *Gelbard v. United States*,
 408 U.S. 41, 52 (1972). Since the statute’s enactment in 1968, the Supreme Court

1 has repeatedly confirmed that the handful of exceptions provided in the statute are
 2 the only circumstances in which covert interceptions of oral or wire
 3 communications are permissible. *Id.* (“Except as expressly authorized in Title III, ...
 4 all interceptions of wire and oral communications are flatly prohibited.”); *See also*
 5 *United States v. Giordano*, 416 U.S. 505, 514 (1974); *People v. Otto*, 2 Cal. 4th
 6 1088, 1098-1112 (1992)(discussing federal and state courts’ near unanimous
 7 refusal to recognize new, unenumerated exceptions based on the plain language of
 8 Title III).

9 Here, because Mr. Pellicano recorded his communication with
 10 Mr. McTiernan for the purpose of committing a criminal or tortious act, Section
 11 2511(2)(d) prohibits the government’s use of the Recording at trial. The evidence
 12 shows that, more likely than not, Mr. Pellicano had at least one criminal or tortious
 13 purpose in recording Mr. McTiernan. This includes but is not limited to
 14 Mr. Pellicano’s criminal purpose in that he made and used the Recording as a
 15 record-keeping mechanism intended to further his illicit operations. If the court
 16 concludes, as it should, that Mr. McTiernan has shown by a preponderance of the
 17 evidence that Mr. Pellicano had at least one criminal or tortious purpose in making
 18 the Recording, then the plain language of Title III requires suppression.

19 **B. There Are No Judicial Exceptions to Title III That Can Overcome**
 20 **the Plain Language Of The Statute**

21 In other cases the Government has unsuccessfully argued for a judicially-
 22 created exception to Title III’s statutory scheme. *See Chandler v. United States*
 23 *Army*, 125 F.3d at 1302; *United States v. Lam*, 271 F.Supp. 2d at 1184-85.
 24 However, the Ninth Circuit has explicitly rejected a “clean hands” or “innocent
 25 recipient” exception. *See, e.g., Chandler v. United States Army*, 125 F.3d at 1302.
 26 In *Chandler*, the Ninth Circuit rejected the Sixth Circuit decision of *United States*
 27 *v. Murdock*, 63 F.3d 1391 (6th Cir. 1995) which allowed introduction of evidence
 28 obtained by an illegal private wiretap where the government “took no part in the
 interceptions.” The *Chandler* decision reminds that Title III “makes illegal not

1 only unauthorized interceptions but also the disclosure and use of information
 2 obtained through such interceptions.” *Chandler v. United States Army*, 125 F.3d at
 3 1302.⁷ Additionally, *Chandler* affirms that the Supreme Court has expressly
 4 rejected the argument that “the invasion of privacy is over and done with” once the
 5 interception has occurred. *Id.*, quoting *Gelbard v. United States*, 408 U.S. at 52.

6 In addition to the Ninth Circuit, the First, Third and Fourth Circuits have also
 7 expressly rejected a “clean hands” exception. *See United States v. Vest*, 813 F.2d
 8 477, 481 (1st Cir. 1987); *In re Grand Jury*, 111 F.3d 1066, 1079 (3rd Cir. 1997);
 9 *United States v. Crabtree*, 565 F.3d 887, 892 (4th Cir. 2009). In fact, the 6th
 10 Circuit’s decision in *Murdock* appears to be the only decision to read a “clean
 11 hands” exception into § 2515, with all other circuit courts rejecting such an
 12 exception. *United States v. Crabtree*, 565 F.3d at 889, 891 (“The statute seems to
 13 clearly and unambiguously prohibit the use in court of improperly intercepted
 14 communications; we simply see no gaps or shadows in the language that might
 15 leave lurking a clean-hands exception. Because the statute is clear and
 16 unambiguous, our inquiry typically would start and stop with its plain language”).

17 **C. The Illegally Obtained Recording Should be Suppressed Because**
 18 **this Court Should Not Give Recognition to “Evidence” Obtained**
 19 **by Illegal Acts**

20 Title III was enacted to serve two purposes: the need to protect individual
 21 privacy by prohibiting unauthorized electronic communication interceptions and
 22 the need to equip law enforcement with a weapon necessary to battle organized
 23 crime. Omnibus Crime Control and Safe Streets Act of 1968, *See* S. REP. No. 90-
 24 1097, at 2153-58 (describing Title III goals of privacy protection and law
 25 enforcement). In essence, Title III’s policy objective of privacy protection requires
 26 courts to interpret § 2515 as a deterrent both to the perpetrator’s disclosure of
 27 illegal interceptions and to the innocent recipient’s disclosure of illegal

28 ⁷ In *Chandler*, the Ninth Circuit found that the Army’s use of taped conversations between officers supposedly engaged in an adulterous affair, which tapes were made by the spouse of one officer, was improper since (among other grounds) the investigators were specifically aware that the recordings were unlawfully intercepted. *Chandler v. United States Army*, 125 F.3d at 1302.

1 interceptions. *See, e.g., United States v. Vest*, 813 F.2d at 481 (When a court
 2 operates under a “clean hands” exception the court provides great incentive for
 3 private parties to intercept communications illegally).

4 “Moreover, § 2515 serves not only to protect the privacy of communications,
 5 but also to ensure that the courts do not become partners to illegal conduct: the
 6 evidentiary prohibition was enacted also ‘to protect the integrity of court and
 7 administrative proceedings.’” *Gelbard v. United States*, 408 U.S. at 51. In
 8 *Gelbard*, the U.S. Supreme Court denied the Government the ability to use
 9 information obtained from an illegal wiretap when cross-examining a grand jury
 10 witness. After an exhaustive analysis of the legislative intent behind Title III, the
 11 Supreme Court concluded that, importantly, the invasion of privacy does not cease
 12 upon the conclusion of an illegal interception but continues with each subsequent
 13 disclosure. *Id.* at 51-52. Additionally, Justice Douglas (concurring), described the
 14 critical importance of trial courts abiding by the plain language of § 2515, even if it
 15 allows certain defendants to avoid prosecution:

16 “In a government of laws, existence of the government
 17 will be imperiled if it fails to observe the law
 18 scrupulously. Our Government is the potent, the
 19 omnipresent teacher. For good or for ill, it teaches the
 20 whole people by its example. Crime is contagious. If the
 government becomes a lawbreaker, it breeds contempt for
 law; it invites every man to become a law unto himself; it
 invites anarchy.”

21 *Id.* at 68, quoting *Olmstead v. United States*, 277 U.S. 438, 485 (1928).
 22 Furthermore, “the federal courts have an obligation to set their face against
 23 enforcement of the law by lawless means because public confidence in the fair and
 24 honorable administration of justice, upon which ultimately depends the rule of law,
 25 is the transcending value at stake.” *Sherman v. United States*, 356 U.S. 369, 380
 26 (1958).

27 These important principles were reaffirmed in 2009 by the 4th Circuit in
 28 *United States v. Crabtree*. There, Mr. Crabtree received a twenty four month

1 sentence for violating the terms of his supervised release. The Government
2 established some of the violations by introducing into evidence certain audiotapes
3 that were made by Mr. Crabtree's girlfriend, who secretly recorded his telephone
4 communications. *United States v. Crabtree*, 565 F.3d at 888. Over Mr. Crabtree's
5 objection, the district court admitted the secretly recorded audiotapes into evidence.
6 Thereafter, the 4th Circuit vacated the district court's judgment and, in remanding
7 the case, specifically held that the audiotapes were not admissible. Reasoning that
8 the protection of privacy was an overriding congressional concern when Title III
9 was enacted, the court stated: "We have stated time and again that courts must
10 presume that a legislature says in a statute what it means and means in a statute
11 what it says there. When the words of a statute are unambiguous, then, this first
12 canon is also the last: judicial inquiry is complete." *Id.* at 889, quoting *Connecticut*
13 *Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992).

14 While this Court may have distaste for the notion of suppression of the
15 Recording under the facts of this case, that should not preclude suppression. *See*
16 *Gelbard v. United States*, 408 U.S. at 65 ("Here it is only necessary to adhere to the
17 basic principle that victims of unconstitutional practices are themselves entitled to
18 effective remedies. For, 'where federally protected rights have been invaded, it has
19 been the rule from the beginning that courts will be alert to adjust their remedies so
20 as to grant the necessary relief.'"), quoting *Bell v. Hood*, 327 U.S. 678, 684 (1946);
21 *See also United States v. Crabtree*, 565 F.3d at 890 ("We recognize, of course, that
22 the absence of a clean-hands exception to § 2515 could on occasion prevent the
23 government from obtaining a criminal conviction. There is no reason, however, for
24 us to presume that Congress was somehow unaware of this possibility.").

25 The history of Title III shows that it has real substance, it was not merely a
26 housekeeping, procedural matter that was squeezed into a larger bill. The Act was
27 co-sponsored by both Hubert Humphrey and Barry Goldwater and it came at a time
28 of widespread national abhorrence at the realities of totalitarian governments, be

1 they German Fascist, Russian Stalinist, Chinese Maoist or Cuban Fidelista. The
 2 movement behind the Act grew from the recognition that a central feature of all of
 3 these governments was the use of secret informants to cow the population into
 4 subservience. As a result, the statute bluntly states that no secretly-made
 5 recordings may be used as evidence against an American citizen unless --

6 A) They were made by legitimate, court-supervised law enforcement, or

7 B) They were innocently made.

8 This is not accidental. The law has a significant purpose and intention.
 9 Though in this case it is obviously -- indeed, ironically -- inconvenient to the
 10 Government, it would be unfortunate if, in the give and take necessary to achieve a
 11 just resolution, it were given short shrift. It might in fact be a bit of judicial
 12 legislation that the Court would presumably prefer to avoid.⁸ The statutory
 13 language here is clear and unambiguous. Given the extensive evidence showing
 14 that Mr. Pellicano made the Recording as part of his record keeping activity in
 15 furtherance of the criminal enterprise, this motion should be granted.

16 **D. Similar to *Vest*, the Recording Should be Suppressed Because**
 17 **Mr. Pellicano Created it as a "Receipt" or Record**

18 Here, Mr. Pellicano has confirmed that he recorded his clients for
 19 "inventory; for safekeeping; for, in effect, to remind himself of what he needed to
 20 do." Ex. 2 to Neal declaration. This was a criminal purpose as record keeping is a
 21 function that furthers a criminal enterprise or conspiracy. *See, e.g., United States v.*
 22 *Smith*, 893 F.2d at 1575-78.

23 In *Vest*, Jesse Walters was arrested for shooting a police officer and then
 24 released on bail. Mr. Waters made a secret agreement with the officer he shot
 25 (Tarantino) to pay \$300,000 for his promise to help Mr. Waters avoid
 26 imprisonment. Officer Vest agreed to facilitate the payment. When Mr. Waters

27 _____
 28 ⁸ Also true is that while the Government contends the Recording is evidence of a crime, it is also
 evidence of the cessation of a crime (fully five and a half years before the government knew
 anything about it). We urge the Court, in balancing the scales in this matter, to bear that in mind.

1 met with Officer Vest to make payment he (Mr. Waters) secretly recorded the
2 transaction. Mr. Waters subsequently turned over the tape to authorities and
3 Officer Vest was prosecuted. *United States v. Vest*, 813 F.2d at 479. After
4 Mr. Waters testified that he made the recording to create a “receipt” in the event
5 there was a dispute over the payment, the district court granted Officer Vest’s
6 motion to suppress holding that the recording was made in violation of § 2515.
7 Specifically, the district court found that the “receipt” motive constituted an
8 impermissible purpose. *United States v. Vest*, 639 F.Supp. 899, 907 (D.Mass.
9 1986).

10 Similarly, Mr. Pellicano recorded his clients as a form of receipt or record
11 keeping. This is established by Mr. Pellicano’s statement regarding his purpose
12 and by the statements and testimony of PIA’s former employees. *See* Exs. 2-8, 10-
13 17 to Neal declaration. Additionally, Mr. McTiernan asks the Court to consider the
14 observable pattern whereby Mr. Pellicano consistently used his secret client
15 recordings to confirm his clients’ financial obligations to him. (*See*, e.g., Exs. 29-
16 31 to Neal declaration, trial transcript pages setting forth recordings of
17 Mr. Pellicano and Charles Lull, John McTiernan and Adam Sender, respectively).
18 Mr. Pellicano also repeatedly used the client recordings to extract a promise of
19 secrecy from clients to allow Mr. Pellicano to have control over the clients. (*See*,
20 e.g., Exs. 32-35 to Neal declaration, trial transcript pages setting forth recordings of
21 Mr. Pellicano and Andrew Stevens, Chris Rock, Mark Cohn and Kenneth Starr,
22 respectively).

23 Without question, there is substantial evidence that Mr. Pellicano used
24 various forms of leverage to control his clients, command unconscionable fees and
25 protect the criminal enterprise. The client recordings were an essential part of his
26 ability to achieve his criminal goals, and thus were made for a criminal purpose. It
27 is significant that Mr. Pellicano did not record clients such as Bert Fields, whom he
28 trusted. This further demonstrates that Mr. Pellicano’s recording of specific clients,

1 such as Mr. McTiernan, was purposeful.

2 **E. Mr. McTiernan's Motion to Suppress Materially Differs from**
 3 **Other Suppression Motions Brought by Mr. Pellicano's Alleged**
 4 **Co-Conspirators**

5 Mr. McTiernan anticipates that the Government may argue that this Court
 6 has determined the issue presented by this motion by virtue of motions brought by
 7 Terry Christensen. However, there are several reasons why this Court's rulings as
 8 to Mr. Christensen should not foreclose the granting of this motion. As an initial
 9 matter, substantially more evidence of Mr. Pellicano's criminal or tortious purpose
 10 in recording his clients surfaced during Mr. Pellicano's two trials. In addition,
 11 Mr. Christensen was charged as Mr. Pellicano's co-conspirator and alleged to be an
 12 active participant in their conspiracy. Mr. McTiernan is not charged as a co-
 13 conspirator and this distinction is of great importance.

14 In *United States v. Lam*, after defendant Mei Keng Lam was charged with
 15 illegal gambling she moved to suppress taped telephone conversations of her bets
 16 with the gambling operation. The recordings were made by the bookie without Ms.
 17 Lam's knowledge or consent (just as with Mr. McTiernan). *United States v. Lam*,
 18 271 F.Supp. 2d at 1184. Ms. Lam relied primarily on *United States v. Vest*, arguing
 19 that the bookie made the recordings "as a means of keeping business records for his
 20 unlawful gambling activities." *Id.* In granting Ms. Lam's motion to suppress, the
 21 district court expressly held that because Ms. Lam was not a co-conspirator she
 22 could not be found to have given constructive consent to the decision of the bookie
 23 to record their calls. *Id.* at 1186. Accordingly, the court distinguished between a
 24 *customer* versus a *confederate*.

25 Here, the Government merely alleges that Mr. McTiernan was
 26 Mr. Pellicano's client; conversely, the Government formally charged
 27 Mr. Christensen with conspiracy and alleged that he was an attorney-intermediary
 28 for his client Kirk Kerkorian. Certainly, *Lam* has much stronger application to
 Mr. McTiernan (a one time customer who had a single call unknowingly recorded)

1 than Mr. Christensen (an allegedly active player in the ongoing conspiracy with a
 2 much higher volume of recorded calls).⁹ Mr. McTiernan did not have the requisite
 3 conspiratorial involvement to give constructive consent to Mr. Pellicano to create
 4 the Recording. *Id.* (“While an individual’s decision to record her telephone
 5 conversations unlawfully could not sensibly be seen as a threat to her own privacy,
 6 the same is not true of an unlawful recording by another party to the
 7 conversation.”).

8 **F. Mr. Pellicano Recorded his Clients to Create Illegal Leverage**
 9 **Over Them and to Have Information to Trade/Sell to Tabloids**

10 Attached to the Neal declaration as Exhibit 36 is the FD-302 Report of Susan
 11 Maguire, a former PIA client. Ms. Maguire estimated that she paid Mr. Pellicano
 12 \$1 MM for his “work” on her divorce case. Ms. Maguire learned that
 13 Mr. Pellicano recorded his own calls, some of which he played for her. She also
 14 heard clicking sounds on her home phone. However, she was intimidated by
 15 Mr. Pellicano, who “told stories of intimidated [sic] people with a baseball bat,
 16 killing animals, and would sometimes place a gun on a coffee table while talking to
 17 Maguire.” *See* Ex. 36 to Neal declaration. Ms. Maguire indicated that she was
 18 scared of Mr. Pellicano and she even discussed the fear he caused her with a
 19 therapist. Despite her fear, she was unable to extricate herself from his contacts
 20 and her own attorney told her it was in her best interest to stay on Mr. Pellicano’s
 21 good side.

22 In another example of Mr. Pellicano secretly recording his own client to gain
 23 leverage over them, he secretly recorded his client John Gordon Jones, and when
 24 the tapes proved exculpatory he refused to turn them over to Jones’ legal team.
 25 (*See* Ex. 37 to Neal declaration, Los Angeles Times article dated 3/17/06).
 26 Additionally, Ex. 38 to the Neal declaration is a FD-302 Report for Ron Austin, a

27 _____
 28 ⁹ It should also be noted that Mr. Pellicano recorded only one call with Mr. McTiernan. Of
 course they spoke more than once as the Recording makes clear it is not an initial or introductory
 call. This suggests that Mr. Pellicano made a purposeful decision to create the Recording.

1 former employee of attorney Richard Sherman (attorney for Mr. Jones).
 2 Mr. Austin confirms that Mr. Pellicano, despite receiving \$200,000 from Mr. Jones,
 3 secretly “bugged” Mr. Jones’ residence and then played “both sides” by discussing
 4 the case with the LAPD. This provides yet another example of Mr. Pellicano
 5 recording his clients for his own illicit purposes or to create leverage against them,
 6 purposes that are criminal and tortious.

7 Finally, attached to the Neal declaration as Ex. 39 is a transcript of recorded
 8 conversations between Mr. Pellicano and a tabloid reporter named Jim Mitteager
 9 showing that Mr. Pellicano was willing to trade information about his clients with
 10 tabloid reporters. Counsel for Mr. McTiernan is informed that the Government has
 11 the Mitteager recordings but it has refused to produce them. The Court should
 12 compel production of the recordings and, at the very least, listen to them *in camera*
 13 to determine their relevance to this motion to suppress.

14 Accordingly, the evidence shows that Mr. Pellicano not only used client
 15 recordings to refresh his recollection concerning client activities. He also used the
 16 recordings as possible material to trade or sell to the tabloids. It is more likely than
 17 not that he made and retained client recordings in connection with his relationship
 18 with the tabloid media. Mr. Pellicano strategically released confidential client
 19 information to promote himself or to cause others to fear his “connections.”
 20 Additionally, he was free to sell the recordings, trade them for information, or use
 21 them to embarrass a client or former client who opposed him. All of these reasons
 22 for making the client recordings constitute criminal and tortious purposes.

23 **IV. REQUEST FOR EVIDENTIARY HEARING**

24 **A. Alternatively, if the Court is Not Inclined to Grant this Motion** 25 **Based on the Evidence Submitted, Mr. McTiernan Respectfully** **Requests an Evidentiary Hearing**

26 Whether an interception was made for the purpose of committing any
 27 criminal or tortious act is a question of fact. *United States v. Phillips*, 540 F.2d at
 28 325. Here, Mr. McTiernan’s extensive offers of proof raise material, specific and

legitimate issues of fact that should be determined at an evidentiary hearing. “A party seeking to suppress [an intercepted communication] must be given a full and fair opportunity to meet his or her burden of proof.” *Id.* at 326-27 (Matter remanded to district court for evidentiary hearing); *See also United States v. Rose*, 526 F.2d 745, 749-750 (8th Cir. 1975). Mr. McTiernan has met the threshold showing requiring an evidentiary hearing. *See United States v. Mavroules*, 813 F.Supp. 115, 121 (D. Mass. 1993)(granting evidentiary hearing to determine whether conversation had been intercepted for the impermissible purpose of a criminal or tortious act); *United States v. Nietupski*, 731 F. Supp. 881, 882 (C.D. Ill, 1990).

At an evidentiary hearing Mr. McTiernan would seek, at a minimum, to call Mr. Pellicano as a witness to examine him as to his purpose in making the Recording. Additionally, Mr. McTiernan would seek to introduce live testimony from former PIA employees and clients. Among other things, Mr. McTiernan would also seek to introduce the Mitteager recordings into evidence and/or to offer live testimony regarding those recordings.

V. CONCLUSION

Mr. McTiernan respectfully submits that the record establishes that it is probable that Mr. Pellicano made the Recording for a criminal or tortious purpose. Accordingly, the plain language of Title III requires that the Government be precluded from using the Recording and the fruits of that communication.

Respectfully submitted,

DATED: April 26, 2010

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